No. 278.

FILED
NOV 28 1900
JAMES H. McKENNEY,
Clerk.

Brf. of Dudley & McHenry for P. C.

SUPREME COURT

of the United States.

Filed Nov. 28, 1900.

OCTOBER TERM, 1900.

No. 278.

HOMER BIRD, Plaintiff in Error,

vs.

THE UNITED STATES.

In error to the District Court of the United States for the District of Alaska

---

Brief of Plaintiff in Error.

MALONY & COBB,

of Counsel for Plaintiff in Error.

Daily Dispatch Print, Juneau, Alaska.

26010

SUPREME COURT

of the United States.

OCTOBER TERM, 1900.

No. 278.

HOMER BIRD, Plaintiff in Error,

vs.

THE UNITED STATES.

In error to the District Court of the United States for the District of Alaska

Brief of Plaintiff in Error.

MALONY & COBB,
of Counsel for Plaintiff in Error.

STATEMENT OF THE CASE.

The folow ing is a statement of the case sufficient to enable the Court to understand the questions raised:

On the 9th day of November, 1899, the grand jury for the

District of Alaska returned an indictment against Homer Bird, the plaintiff in error, charging him with the crime of murder, alleged to have been commited on the 27th day of September, 1898, on the Yukon river, in said District, at a point about 600 miles above the mouth of said river, by shooting and killing one J. H. Hurlin.

The defendant was arraigned on November 10th, and served with a list of the petit jury for that term of Court. (Printed record p. 2.)

On November 13th defendant plead not guilty and the cause was set for trial for the next day, leave however, being given by the Court to file an application for a continuance. [Printed record p. 4.]

The application was presented [Rec. 4-6] and denied. [Rec. 6.]

The defendant was put upon his trial on December 1st, 1899, [Rec. p. 8] and was convicted [Rec. 22] and sentence of death imposed [Rec. 37.] A bill of exceptions was settled and allowed, [Rec. 40-61] a petition for a writ of error presented. [Rec. 61] and allowed, (Rec. 62) a writ of error sued out, citation in error served, (Rec. 64) errors assigned, (Rec. 64-69) and the case is now here presented for correction and revision.

A party of five, composed of Hurlin, the deceased, Robert L. Patterson, Charles Scheffler, Homer Bird, the defendant, and a woman going under the assumed name of Naomi Strong, left the city of New Orleans in the early part of the year 1898, bound for the Yukon river, to prospect for gold. Defendant and Naomi Strong had been acquainted for some years prior thereto and had sustained intimate sexual relations toward each other. The other men in the party however, and the defendant were strangers until a short time prior to their leaving New Orleans and the acquaintance was begun by the defendant answering an advertisment inserted in the newspapers by Patterson, for a man with some money to join in a prospecting excursion to Alaska. The party

reached San Francisco in May, 1898, and in addition to an outfit of clothes and provisions to last them 18 months or two years, also procured a small steam launch and a scow. This scow was 32 feet long, 6 or 7 feet beam and 3 feet deep. The whole outfit cost about $2000.00 It had been agreed that each of the men in the party was to furnish $500.00, but Scheffler failed to furnish anything, and Hurlin and Patterson furnished about $500.00 each and the defendant $1000.00. The party sailed from San Francisco May 21st and reached St, Michaels early in July. On the vessel the defendant and the woman occupied the same stateroom as man and wife under the name of Mr. and Mrs. Burdick, and Patterson, claiming to be the woman's brother, also had a berth in the same room About a week after reaching St. Michaels the party left for the Yukon in their two boats, the scow being towed by the steam launch. The provisions, etc., were packed in the scow in the following manner: Beginning about four feet from the stern of the scow, the entire space forward to a point near the bow, was filled in to about the depth of the boat itself, the boxes, bags, etc., being packed in such manner that the top thereof was level. In the stern was a seat, upon one end of which was a cook stove where the cooking for the party was done, and between the seat and the provisions was an open or vacant space about 2 feet wide, running the entire width of the boat. In this space on the right hand side, looking forward, sat a water barrel, ordinary size. The end of the pile of provisions next this empty space was also utilized as a seat, and on one side of it, next the water barrel, was a box about 2 feet long, in which the dishes, knives, forks, etc., were kept, commonly called the grub box. This scow was entirely covered in with a canvas cover and was the general living place of the party. Just forward of the grub box, on the right hand side looking forward, and made down lengthwise of the boat, on top of the provisions was the bed occupied by defendant and Naomi Strong. On the other side, just opposite, and with barely passage way between, was the bed occupied by Patterson, made down in the same way. On the forward end of the provisions, and made down across the boat was the bed occupied by Hurlin, the deceased, and Schef-

fler.

Sometime in September the party reached a point on the Yukon river about 600 miles above its mouth and some two miles below a coal miners' camp, and determined to go into winter quarters. For that purpose they began the construction of a cabin. About the 24th of September the party determined to separate, Hurlin, Patterson and Scheffler going away and defendant and Naomi Strong remaining together, The tragedy occured on the morning of September 27th.

Up to this point there is no serious conflict in the testimony. But regarding the causes that led up to the fatal difficulty, and the circumstances immediately surrounding the killing, the evidence was sharply conflicting, and often squarely contradictory. The only eye-witnesses to the homicide, beside the defendant himself, were Charles Scheffler and Naomi Strong.

The theory of the prosecution, based upon the testimony of these two witnesses, was that defendant was so quarrelsome and disagreeable that on September 24th the three men, Hurlin, Patterson and Scheffler determined to leave defendant and the woman; at defendant's request, however, they agreed to stay and help finish the cabin. The cabin was finished on September 26th, In the meantime there had been disagreements about the division of the supplies—Hurlin and Patterson wanting three-fifths for their party and defendant claiming one-half on the ground that he had paid for one-half. Defendant proposed to leave this matter to arbitration before the coal miners at the camp two miles above, but Hurlin and Patterson refused. This matter had not been adjusted on the morning of the 27th. On that morning the party sat down to breakfast, in the following order: Hurlin, Patterson and Scheffler on the rear end of the pile of provisions in the scow, facing the stern of the scow, Hurlin next the grub box, Scheffler in the middle and Patterson on his right and next the left or port side of the scow. Naomi Strong sat on the seat in the rear of the scow, immediately in front of and facing

Hurlin. Defendant sat upon his bed about four feet behind, and a little to the left of Hurlin and the other men. While the party were eating breakfast, defendant suddenly, and without warning, rose up with his shot gun in his hands, shot and killed Hurlin, the shot taking effect in the back of the head, and shot and seriously wounded Patterson, the shot taking effect from the lower part of the left shoulder blade up to the jaw. (Printed R. pp 49 to 52.)

It was claimed by the defendant on the other hand, that up to the 20th or 22nd of Sept. there had been no serious disagreement between the parties; that about that date, Hurlin, Patterson and Scheffler determined to leave and cut wood for the steamers that would go up the river in the spring. At defendant's request they remained until the 26th to help finish the cabin. A few days before the shooting, defendant and Hurlin and Patterson had a disagreement about dividing provisions, they wanting to take three-fifths, and defendant insisting upon one-half, and defendant proposed to arbitrate before the coal miners, but Hurlin and Patterson refused. Nothing more was said about it, however, 'till the morning of the 27th. On the night of the 26th up at the cabin Naomi Strong warned defendant that Hurlin and Patterson were down at the scow loading their guns, and that if he, defendant did not "let them have the provisions there was going to be trouble." When defendant returned to the boat, however, Hurlin and Patterson had gone to bed and nothing was said. The morning of the 27th, Hurlin and Scheffler got up first and went up into the woods towards the cabin. Defendant then arose, got his coffee, gave the woman her coffee and went up to the cabin, leaving Patterson in bed. About an hour later Scheffler came up to the cabin and told defendant that Patterson said come down and divide the provisions. Scheffler went back ahead of defendant and defendant told him he would be down in a minute. In a little while defendant went down, and Patterson was on the bank, where he had laid out a lot of brush to put the provisions on. Defendant walked into the boat, and Naomi Strong called them all to breakfast. They all had breakfast, during which nothing of any moment occurred.

After breakfast Naomi Strong and Scheffler began washing up the dishes, and defendant sat down upon his bed, and Patterson and Hurlin sat down upon Patterson's bed. Hurlin got out his bills and defendant got out his bills and begun to cast up what each had paid out, and they "began jawing." Hurlin and Patterson wanted the provisions divided into five equal shares, but defendant objected to this on the ground that Scheffler had paid nothing, and proposed to get John Tompkins the coal miner and let him make the division. Hurlin and Patterson refused to do this, and said they would divide the provisions to suit themselves. Defendant replied, "no you won't, you want to beat me out of my money I put up." And Patterson said "you are a damn liar," and struck defendant in the face. Defendant thereupon struck Patterson in the eye. At that moment Naomi cried out, "look out Homer, they are going for their guns," and defendant ran and got his gun from behind the water barrel, the place where it was usually kept. When defendant got his gun, Hurlin was getting his gun, which was under his sleeping bag, and he was in a stooping position, with his face towards the left side of the boat, raising up with the gun in his hand and the defendant shot him, and Hurlin fell over in front of the pile of provisions, falling across his gun, and in his fall he broke the stock of it. Defendant then looked and saw Patterson pass up from under the canvas cover that was over the boat toward the gun that was standing in the bow and shot him with the other barrel. Defendant's object in shooting Patterson was because he thought he was making for his gun. His attention was called to them by Naomi Strong. Hurlin was shot in the left side of the face and Patterson in the left shoulder. Patterson ran out of the bow of the boat onto the shore. He never was in the water at all, and defendant never fired at him but the one time. (Pr. R. pp 52-4). And this was all the testimony on behalf of the defendant relating to the circumstances of the killing and the provocation that led up to it. (R. p 54.)

The errors that will be relied upon relate to the action of the court in empaneling the jury; sustaining improper challenges for

26013

cause made by the government; in admitting improper evidence in behalf of the plaintiffs; improper argument of the District Attorney permitted by the Court over the defendant's objection; errors in instructions given to the jury; and the failure of the Court to send out with the jury on their retirement, the written instructions given. These points will now be presented in their order.

THE SECOND AND NINTH ASSIGNMENT OF ERRORS

Relate to the same point and will be presented together. These two assignments question the correctness of the action of the Court, in compelling the defendant to go to trial with, and selecting his trial jury from the panel of 43 names contained in the jury box and putting him on trial before the jury of 12 finally selected. (R. p 65). The bill of exceptions (p 41), shows the following state of facts: On Nov. 9th 1899, the defendant was served with a list of names, purporting to be a list of petit jurors drawn for that term of the District Court for the District of Alaska and to be the panel of jurors from which the trial jury for the trial of his cause would be drawn. Said list contained the names of 75 persons. Afterwards on the 1st day of December 1899, when the defendant was put upon trial, only 43 of said names remained in the jury box. It further appeared that 24 of the jurors drawn for that term had been excused by the Court, prior to the calling of this cause for trial and of the remaining 8 persons, one was sick and 7 had not been served. The defendant thereupon objected to further proceeding with the trial of said cause at said time and the further selecting and drawing of said jury from said box, because he had not been served with the correct list of names, in such jury box and because 24 jurors, whose names appeared upon the list

when served upon the defendant, had been excused without the consent of the defendant and the defendant was therefore denied his legal right to be tried by a jury selected from the panel served upon him, but the Court overruled said objections and ordered the trial to proceed, to which action of the Court, defendant duly excepted. And it further transpired that when 8 jurors had been selected, accepted and sworn upon the trial of said cause, the 43 jurors whose names were in the jury box were exhausted and the Court ordered the Marshal to summon bystanders to complete the panel, and the defendant thereupon renewed the objections above made and to the summoning of the bystanders and the selecting of the balance of the trial jury therefrom, for the reason that having been served with a list of the jury drawn according to law, he had a legal right to a trial by jury selected from such list, and it was a denial of such right to excuse a third of such list and compel him to go to trial by a jury selected from bystanders; but the Court overruled said objections and ordered the summoning of the bystanders, from among whom 4 additional jurors were selected; to which action of the Court defendant duly excepted [R. p 41].

Section 119 of the Alaska Code of Criminal Procedure, provides: "That jurors for the trial of persons accused of any of the crimes defined in the laws of the United States applicable to the District of Alaska.....shall be selected and summoned in the manner prescribed by the laws of the U. S. with respect to jurors in the United States District and Circuit Courts" Section 1033 of the Revised Stat. of the U. S. requires, in a capital case, that a list of the jurors shall be delivered to the defendant two entire days before the trial. It is clearly the purpose of the law by the provisions quoted, to give a defendant, upon trial for his life an opportunity to know who the men are, from among whom his trial jury are to be selected. This is an important right and very valuable to the defendant to enable him to intelligently exercise his right of peremptory challenge. In this case between the time when the jury was served and the time when defendant was put upon trial, the Court arbitrarily and without defendant's consent,

excused 24 men from said list. This we think a clear denial of a legal right of defendant. If the Court had the right to excuse 24 of the jury drawn, without reason, he had a right to excuse 74 and thus negative a valuable right given to the defendant by law. In this case we think the Court had no more right to arbitrarily compel the defendant to go to trial before a jury one-third of which was selected from bystanders than it would to compel him to go to trial before a jury composed of bystanders entirely. We do not question the propriety of completing a jury by summoning bystanders when the regular panel has been legally exhausted. But the point is, that the Court arbitrarily excused a large part of the regular panel, thus creating a necessity for the summoning of bystanders, which would not otherwise have arisen.

(1 Thompson on Trials, sec. 21.)

THE FOURTH ASSIGNMENT OF ERROR

challenges the action of the Court in sustaining the challenge of the Government for cause to the juror E. R Jaeger.

The bill of exceptions (R. p. 42-43), shows in effect that when the juror was being examined upon his voir dire, his examination showed in substance that the juror would require stronger testimony to convict the defendant if he was shown to have a wife and child than if he were a single man. That it would take stronger testimony for him to render the same verdict against a man with a wife and child than it would against a single man. The District Attorney thereupon challenged the juror for cause. The defendant resisted said challenge but the same was allowed by the Court; the defendant duly excepted.

We think this clearly erroneous. If a man has given "Hostages to fate," we think he has a right to have that fact considered when put upon trial for his life for an alleged crime Where the evidence is conflicting and one theory of the case means death, and the other theory of the case means liberty, the defendant has a right, we think, to throw into the scale, if he can, not only his previous good character, but also the fact that he has a wife and children and others depending upon him, as showing the strongest reasons for abstaining from crime; and a juryman who knows so little of human nature that he would require no stronger evidence to convict a man in the one case than he would in the other, would be unfit to pass upon the life of a fellow-man.

SIXTH ASSIGNMENT OF ERROR

is as follows: "The Court erred in sustaining the challenge of the Government to the jurors Henry Hall and Floyd Ryus," [R. p. 65]. The bill of exceptions, (R. p. 47) shows that when these two jurors were being examined upon their voir dire they stated that they served as jurors at the regular term of the court in November, 1898, but had not served as jurors since the said term. They were thereupon challenged by the Government, which challenges were resisted by the defendant, But the Court allowed the challenge and excused the jurors to which ruling of the Court defendant duly excepted.

It is difficult to see any reason for the action of the Court in this matter other than that the Government did not want said jurors and the Court was not willing to make the Government exhaust peremptory challenges upon them. The trial took place in December; more than a year had gone by, since the jurors had served in that capacity before, yet they were challenged on that ground and the challenge sustained. The statute (21 U. S. Stats., 43) pro-

26015

vides that no person shall serve as a petit juror more than ONE TERM in any one year. Service as a juror at the November term, 1898, is not a disqualification of a petit juror at the November term, 1899.

THE SEVENTH ASSIGNMENT OF ERROR.

This assignment questions the action of the Court in sustaining the challenge of the Government to the jurors D. Ledbetter, George Walker, M. Raber and H. Patterson. (R. p. 65).

The bill of exceptions [6th par. R. p. 47] shows that when these jurors were being examined upon their voir dire, they stated that they had not served as jurors, upon any regular panel, within one year next preceding the convening of that term of court, but had served as talesmen in that period, whereupon counsel for Government challenged said jurors for cause, which challenges were resisted by defendant, but were sustained by the Court and the jurors excused, to which action of the Court defendant excepted.

This action of the Court was clearly erroneous, [21 U S. Stats. 43] forbids any person to serve as a petit juror more than one TERM in any one year, and clearly does not disqualify a person, merely because he has served as talesman on one particular case. Such service is not a service for more than one TERM.

EIGHTH ASSIGNMENT OF ERROR.

This assignment questions the action of the Court in sustaining the challenge of the Government to the juror C. L. Parish, [R p 65]. The bill of exception [7 Par. R. p 47], shows that when the juror was being examined upon his voir dire, he stated that he had not served at any term of the District Court of Alaska as a juryman upon a regular panel within one year next before the convening of this term of Court. That his last service as a juryman was as a talesman at the fall term of this Court, 1898. The Government thereupon challenged said juror for cause, which challenge was resisted by the defendant, but was allowed by the Court and the juror therefore excused, to which ruling of the Court defendant then and there excepted.

The foregoing assignments, we think require a reversal of case, as he was put upon trial before a jury, not drawn and made up as required by law, and because the action of the Court was highly prejudicial to the defendant, in that it, in effect allowed the Government eight more peremptory challenges than it was entitled to by law.

TENTH ASSIGNMENT OF ERROR.

This assignment relates to the action of the Court in allowing to go to the jury, the following testimony of the witness Chas. Scheffler, to-wit: "Witness testified that in the month of August, when the defendant in company with the deceased, Hurlin, R. L. Patterson, Naomi Strong and witness, were going up the Yukon river, in a steam launch, towing a barge loaded with their provisions, Hurlin was steering; that the defendant was very disagreeable to all the other persons; that when they would run into a sand

bar he would curse them; he would say: 'the Dutch sons of bitches don't know where to run it.' On one occasion they were getting wood on the bank of the river and Bird got out and wanted to hit Patterson. Witness didn't remember exactly what was said, but defendant called Patterson 'a son of a bitch' and told him he would 'hammer the devil out of him,' and witness and others would not let them fight. And if anything would go wrong, he, defendant, would not curse in front of the witness and others' faces, but defendant would be disagreeable all the way long and make things very disagreeable. [R. p 65.]

The bill of exceptions, [Par. 10, R. p 54] shows that when this testimony above set out was offered, it was objected to by counsel for the defendant, because it was immaterial and irrelevant and too remote from the time the offense is charged to have been committed, which objections the Court overruled and allowed said testimony to go to the jury.

This action of the Court was clearly erroneous and highly prejudicial to the defendant under the peculiar circumstances of this case. The only two eye-witnesses to the alleged crime, were as defendant claimed, animated in their testimony by enmity and a desire to see him convicted. He claimed that their testimony was false in all its material points; but to meet and overcome this testimony, defendant was from the circumstances of the case, compelled to rely upon his own testimony and whatever improbabilities and contradictions, might exist in the testimony of the witnesses for the prosecution. Under these circumstances to allow the Government to introduce testimony, relating to a quarrel and fight with a person other than the deceased, occurring more than a month, prior to the homicide, and not shown to have the slightest connection with it, was highly erroneous. (Wharton's Crim. Ev. 9th Ed. Sec. 30.)

THIRTEENTH ASSIGNMENT OF ERROR

This assignment questions the correctness of the action of the Court, in admitting before the jury, the following testimony of the witness Chas. Scheffler: "That the reason witness did not take occasion to tell the condition of affairs at their cabin on the evening after the killing of Hurlin and the shooting of Patterson, was that the defendant was watching him all the time and that he couldn't do it; that Patterson was holding secret conversations with defendant and witness could not rely upon Patterson and couldn't trust the woman Naomi Strong, and didn't know what to do. That at the time he took Patterson up to the cabin witness told him, "Bob, I am going to get help" and Patterson said, "that man will finish killing me," and witness promised to stick by him This was not in defendant's presence but it was the first time they took him up to the cabin. Patterson told witness not to go and that he wanted witness to stay with him. And to all that part of the testimony as to the conversation between witness and the said Patterson in the absence of the defendant, the defendant objected because incompetent, irrelevant and immaterial, but the Court overruled said objections and allowed said testimony to go to the jury, to which ruling of the Court, defendant then and there excepted (13 Par. R. p 66.)"

The testimony of this witness, (R. p 50), as well as that of the witness Naomi Strong, (R. p 52) showed that from the time of the homicide, on the 27th of September, until the following March they had been active in concealing the matter from the knowledge of people who were frequently passing. For the purpose apparently of excusing this singular conduct, the Government offered and the Court allowed, the witness to testify to requests made by Patterson and promises made by witness to Patterson, in a private interview between them, which was purely hearsay and incompetent. Not only that, but the Government offered and the Court allowed the witness to testify to a statement of Pattersons that the defendant would "finish killing him" if the witness left him to go for help, which at best could only have been an opinion of Patter-

26017

son as to an intention of defendant to commit another and different crime than that for which he was on trial. That this was error, is an elementary rule of evidence.

FOURTEENTH ASSIGNMENT OF ERROR.

This assignment (R. p 67), questions the action of the Court in admitting in evidence to the jury, the following testimony of the witness Scheffler: "That in the latter part of March, 1899, after Patterson had been carried to Anvik, Bird made a trip up the river and came back with a man by the name of Smith; that Smith left and the next day after that Bird was very disagreeable and tried to pick a fight with the woman Naomi Strong; he acted very funny. You had to watch him and be careful. He got awful good after that, and everything was just so. It was Chas. this and Naomi this."

The bill of exceptions (14 par. R. p. 56) shows that when this testimony was offered the defendant objected to it because irrelevant, incompetent and immaterial. But the Court overruled the objections and permitted the testimony to go to the jury, and the defendant excepted.

The only possible object in introducing this testimony was evidently to show that the defendant was a generally bad man, who would even pick a fight with a woman. The matters testified above occurred six months after the alleged homicide and had absolutely no bearing whatever upon the guilt or innocence of the

defendant; but it is impossible to say what importance may have been attached to such testimony by the jury sanctioned as it was, by the Court.

TWENTIETH ASSIGNMENT OF ERROR

This assignment of error raises the following questions: [R. p. 63]. The bill of exceptions shows [R. p. 59] that the witnesses Naomi Strong and Chas. Scheffler were the only eye-witnesses to the homicide. In describing the wounds inflicted upon Patterson, they stated in substance that he was shot with a 12-bore shotgun loaded with BB or buck shot. That the defendant at the time the shot was fired, was at a distance not exceeding six feet from Patterson. That the shot however took effect from the lower part of the shoulder blade up to a point under the left jaw, a space of from 15 to 18 inches. The defendant thereupon requested that the jury might be taken out in charge of a proper officer to some suitable place and allowed to witness the discharge of a No. 12 shotgun, loaded with shot similar to that described by the witnesses, for the purpose of showing the degree that shot will scatter at the distance testified to by the witnesses for the prosecution, it being expected to show that it was physically impossible for such a wound as that testified to by said witnesses to have been inflicted at the distance described by them, and to corroborate the testimony of the defendant as to the manner of the shooting; but the Court denied said request, to which action of the Court defendant excepted.

We think under the peculiar circumstances of this case the above action of the Court is such error as requires a reversal of the judgment. If the witnesses for the prosecution were telling the truth, the defendant was guilty of a cold blooded murder. If

26018

the defendant was telling the truth he was acting purely in self defense. Now any circumstance that tended to corroborate one or the other was relevant and highly material. The witnesses for the prosecution placed the defendant at a distance not exceeding six feet from Patterson at the time he was shot; but they could not very well testify falsely as to the character of the wounds themselves, since these had been seen by many people after Patterson had been taken to Anvik. If defendant could show that the character of wound inflicted upon Patterson, could not have been inflicted with a shotgun at the short distance of six feet, it was an exceedingly strong circumstance to discredit the whole story of the prosecution. Not only that, but it corroborated the defendant's story, according to which, he was at a distance of about 30 feet from Patterson at the time he shot him. Now if the defendant was entitled to such testimony, clearly the best evidence of it would have been to let the jury witness a discharge of a similar weapon at a like distance, charged with a like load of shot.

TWENTY-FIRST ASSIGNMENT OF ERROR.

This assignment complains of the action of the Court in the following particulars: (R. p 68). It appears from the bill of exceptions (1st Par. R. p 59,) that after the defendant had testified in his own behalf, that immediately after the shooting of Hurlin and Patterson, Scheffler had stated to defendant that they wanted him to join in the trouble and he refused. The Government recalled the witness Scheffler, who admitted that he made the statement. Counsel for the Government thereupon asked the witness "Now then explain why you came to make it," and the witness tes-

tified in substance, that he made said statement because he feared defendant, and everything he said to him had to be yes, and that the statement was untrue and that Hurlin and Patterson never made such request; to which testimony the defendant objected, because the witness's private reasons for making the statement imputed to him were irrelevant and immaterial; but the Court overruled said objections and permitted the testimony to go to the jury.

We submit the point above made without comment

TWENTY-SECOND ASSIGNMENT OF ERROR

This assignment complains of the action of the Court in permitting the line of argument pursued by the District Attorney in his closing argument to the jury. (R. p 68). The bill of exceptions (R. p 59 and 60), shows the following: In his closing argument to the jury the District Attorney stated and argued as follows: "That the defendant, by his counsel, was saving exceptions to the action of the Court and availing himself of every technicality in the hope of securing a reversal of the case in the Supreme Court; that they placed their reliance there, and not upon an acquittal upon the merits, and were attempting to make a record to reverse the judgment of this Court in the Supreme Court."

The defendant objected to such argument as being improper and calculated to mislead the jury and prejudice their minds against him, and requested the Court not to allow such line of argument to proceed; but the Court refused such request and the defendant excepted.

It is clear that a defendant should not be convicted of murder, because his counsel avail themselves of rights which they believe

the law has guaranteed him. It is equally clear, that it is illegitimate argument to contend that such conduct on the part of counsel is tantamount to an admission of, or should lead to, inference of guilt on the part of the defendant. If so, the Court should have unquestionably sustained the objection. Instead of doing so, however, the Court placed the stamp of its approval upon the illegitimate inference which counsel for the Government was seeking to draw. This action of the Court gave an added weight in the minds of the jury to the inference the Government was seeking to draw.

TWENTY-SECOND ASSIGNMENT OF ERROR

This assignment complains of the first paragraph of the instructions given the jury by the Court at the request of the Government, and which is as follows: "The Court instructs the jury, if they believe from the evidence beyond a reasonable doubt, that the defendant Homer Bird, on the 27th day of Sept., 1898, at a point on the Yukon river, about two miles below the coal mine known as Camp Dewey and about 85 miles above Anvik and within the District of Alaska, shot and killed one J. H. Hurlin and that said killing was malicious, premeditated and wilful and that said killing was not in the necessary defense of the defendant's life or to prevent the infliction upon him of great bodily harm, then it is your duty to find the defendant guilty as charged in the indictment."

The bill of exceptions (R. p 60), shows that when the above quoted instruction was given, the defendant excepted to it, because not qualified by the further charge that if the defendant believed and had reason to believe, that the killing was necessary

for the defense of his life, and (or) to prevent the infliction upon him of great bodily harm, then he was not guilty.

That the charge given should have been qualified as requested in the exception, is elementary in the law of self defense.

TWENTY-FOURTH ASSIGNMENT OF ERROR.

This assignment complains of the following instructions given to the jury by the Court at the request of the Government: "That as in this case, where it is claimed by defendant that up to the time of the killing of the deceased there had been no previous quarrel or difficulty, but that the relations had been friendly and amicable, but that in the discussion between defendant, deceased, and one Patterson, of a business matter, a quarrel suddenly sprung up between Patterson and defendant, and defendant struck Patterson in the face after first having been hit by Patterson in the side; that thereupon Patterson started to run away and deceased started in another direction; but that neither Patterson or deceased were armed, and that defendant seized a shotgun and killed deceased, and that at the time of so doing, defendant's life was not in imminent danger or his person in danger of great bodily harm, and that he had no good reason to believe that such was the case, then the defendant is guilty of murder."

The bill of exceptions [R. p 60], shows that when the above quoted instruction was given, it was excepted to by the defendant, for the various errors contained in it which we will now briefly discuss. Under the other instructions given, and the testimony of the witnesses for the prosecution, if the jury believed said witnesses, the defendant was of course guilty of murder. But in the instruction above quoted, which the learned trial judge gave at the request of the Government, the Government abandoned its own

26020

case, as made by its witnesses, and takes up a case which the Court tells the jury is the state of facts claimed by the defendant. In so doing, it grossly misstates the dejendant's case; it assumes as an established fact in the case, wholly without any support in the evidence, [for the defendant's testimony was the only testimony in his behalf as to the facts and circumstances surrounding the killing, [R. p 54] that defendant claimed that Patterson started to runaway. There is no where in the record, any testimony that Patterson started to run away; but the testimony of the defendant was that he started to get his gun. There was no claim by defendant, that neither Patterson or deceased were armed, as assumed by the Court; but the defendant's testimony was, that Patterson was going for a gun and the deceased actualiy had a gun in his hand. There was no claim on the part of the defendant that his life was not in imminent danger or that he had no good reason to believe such was not the case; but his testimony was that he shot Hurlin, when he was in the act of making a murderous assault upon him with a gun; that he shot Patterson because he thought he was making for his gun. (See the testimony for defendant in full, Record, pp 52-54.) The Court not only tells the jury, that defendant claims a state of facts to exist which he did not claim to exist but he further tells the jury, that because defendant makes this claim, he is guilty of murder. The charge in other words does not leave the facts to be found by the jury, but tells the jury WHAT THE DEFENDANT CLAIMS, and "that where, as in this case" such claim is made, the defendant is GUILTY OF MURDER. The instruction was tantamount to a peremptory instruction to find the defendant guilty. In other words defendant was placed in this position: If the jury believed the witnesses for the prosecution, under the instructions of the Court they must find the defendant guilty. If the jury did not believe the witnesses for the prosecution then under the charge complained of, they were bound to find him guilty anyway. In other words with the charge complained of before the jury, the many pages of instructions given, were reduced to this: If you believe the witnesses for the prosecution find the defendant guilty. If you do

not believe the witness for the prosecution, find the defendant guilty anyway. because of what HE CLAIMS to be the facts; which CLAIMS were not left to the jury to find, but were assumed by the Court (2 Thomp. on Trials, Sec. 2295, and authorities there collected.)

TWENTY-FOURTH ASSIGNMENT OF ERROR(A)

This assignment complains of the refusal of the Court to send out with the jury, in their retirement to consider the case, the written instructions read to the jury by the Court. [R. p 69.] The bill of exceptions [R. p 61], shows that all the instructions given by the Court to the jury, either at the request of the parties or of his own motion, were first reduced to writing, and read to the jury, but said instructions were not delivered to the jury to be taken with them into their retirement to consider their verdict, and were not before the jury while they were deliberating upon their verdict, but were immediately after being read to the jury by the Court, filed with the clerk and remained in his custody in his office; to which the defendant then and there excepted.

Section 136, of the Code of Criminal Procedure for Alaska, adopted by Congress March 3rd, 1899, provides among other things as follows: "All written charges and instructions shall be taken by the jury in their retirement and returned with their verdict into Court and shall remain on file with the papers in the case." [Carter's Anotated Alaska Code, p 68.]

This plain provision of the law the Court deliberately violated. This provision of the Code of Alaska, is the re-enactment of Section 7300 of the Code of Ohio and of course when enacted by

26021

Congress for Alaska, in March 1899, it was enacted with the same construction that it had received in the State of Ohio. In discussing the proper construction of this Statute the Supreme Court of Ohio says: "The purpose of this Statute was to secure a carefully considered charge from the Court, free from misleading words, which are sometimes found in unwritten charges, and to have it in such form, that the jury can reach it in their retirement in case they have misapprehended, during its reading by the Court." (Householder vs. Grenby, (40 Ohio St Rep., p 430). This was in a civil case which was reversed for the failure of the Court to comply with this Statute. How much more then is it a reversable error in a capital case? (See also Hopt. vs. People, 114 U. S. p 488, holding mandatory a somewhat similar provision of the Utah Statute.)

We have only presented in this brief the assignments of error that seem most material. In conclusion we submit that the cause must be reversed, 1st. For the errors of the Court in empaneling the jury. 2nd. For the errors of the Court in admitting improper and incompetent testimony. 3rd. For the error of the Court in permitting the argument of the District Attorney complained of. 4th. For errors in instructions to the jury. 5th. For a refusal of the Court to send the written instructions with the jury in their retirement to consider on their verdict. Respectfully submitted,

W. W. DUDLEY & MICHENER and MALONY & COBB,
Counsel for Homer Bird, the Plaintiff in Error.